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Reprinted from the Administrative Law Review, Volume 28, Number 3, Summer 1976.

A quarterly publication of the Section of Administrative Law, American Bar Association

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THE LIMITS OF OBSESSION: FENCING IN THE "NATIONAL SECURITY" CLAIM

Harlan Cleveland*
Stuart Gerry Brown†

It is very important for the United States not to become so obsessed with security matters that laws are freely violated.

—Secretary of State WILLIAM P. ROGERS on August 21, 1973, a few days before he left office

The term "Watergate," at first confined to the break-in at Democratic headquarters in June, 1972, has now entered the American language as catchall for the variety of crimes, allegations of crimes, illegal transactions, personal tragedy, and constitutional crisis in the Nixon Administration. Our inquiry will focus not on the ethical lapses and legal transgressions of government officials who should have known better, but on why they did not know better, and what can be done to build fences around such behavior in the future.

Testimony before the Senate Select Committee on Presidential Campaign Activities revealed that many of the miscreants, from the Cubans who entered the Watergate building to the highest officials involved in authorizing and obscuring dirty tricks, burglaries, and eavesdropping, considered their actions necessary to protect the nation's security—though in the glare of public revelation, indictments, trials, and convictions most of them later doubted it. What is this

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"national security" claim which in the thinking of a good many highly placed lawyers and a few laymen was thought to launder otherwise illegal acts? Where did it come from, and what are the reasonable limits on its exercise?

THE DEVELOPMENT OF EXECUTIVE DISCRETION

During the nineteenth century most Presidents and most pundits seem to have been satisfied with a cautious interpretation of the President's power to act on his own. Except for Lincoln, a wartime President, young scholar Woodrow Wilson, and to some degree Grover Cleveland, the accepted theory for most was what Theodore Roosevelt later called the "Buchanan principle"—that a President should do only what is required by law or by the Constitution. On this principle initiative was often left to the Congress, which felt no remorse in derailing an uncleared Presidential initiative. For example, Grant tried to annex San Domingo and achieved a treaty, only to have it rejected by the Senate. The limiting case of the Buchanan principle occurred when Grant in his final State of the Union message said that "whatever amount Congress may deem proper for these purposes [public works] will be expended." The President had no budget recommendation, and gave advance assurance that there would be no "impounding."

What then seemed the other end of the spectrum was tested in the 1904 election. Theodore Roosevelt had already proclaimed that a President has the power to do in the national interest whatever he is not forbidden to do by law or by the Constitution.[1] In his campaign he laid down what he thought the national interest required, and his resounding victory gave him a mandate to proceed. After interludes of Buchananesque administration, Wilson, during his 1912 campaign and Franklin Roosevelt, especially in 1936, followed the Theodore Roosevelt example. And where they were frustrated in doing what they thought needed to be done within the law and Constitution, it was because they took major initiatives that went so far beyond an electoral mandate (Wilson on the League of Nations, Roosevelt on his proposal to appoint more Supreme Court justices) that opponents were

[1] "My belief was that it was not only his [the President's] right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws." T. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 464 (1913).

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able to prevail by focussing on arguments about Presidential power and initiative.[2]

There comes now out of a generation of war—World, Cold, Korea, Vietnam—a doctrine that extends the spectrum well beyond the activism of Theodore Roosevelt. Paul Appleby, New Dealer and philosopher of public administration, had already said it succinctly: "The government, that is the executive, always has the power to do what it has to do." Attorneys for the government had justified wartime martial law in Hawaii in similar terms: "The law of necessity is the law of necessity." The clearest contemporary exponent of this doctrine is John Ehrlichman, who seemed to be telling the Senate Select Committee that the President has the power to do what he has to do if the national security is at stake—the requirements of national security being determined in secret by the President. This doctrine was explicitly offered in explanation of the short-lived proposal to sanction illegal intelligence activities (the Huston Plan), the various commissions to the notorious "Plumbers" and in defense of their fruitless burglary of Daniel Ellsberg's psychiatrist's office. Questioned as to where a line might be drawn beyond which the President could not go—did his power extend to murder, for example?—Mr. Ehrlichman's reply was not much help: "I do not know where the line is, Senator." Hearings in 1975 before congressional committees investigating intelligence agencies reveal that at least the contemplation of murder under cover of national security has in fact been frequent.

In three landmark cases, extension beyond the bounds of law-for-ordinary-people of the principle that a President has power to do what he thinks he has to do has been tested and found wanting in the courts.

In 1952, during the Korean War, President Truman judged that a prolonged strike in the steel industry was impeding the war effort, and issued an executive order empowering the Secretary of Commerce to seize and operate the steel mills until the strike was settled. The steel industry complied and the mills were reopened under government control. At the same time the industry went to court for an injunction on the ground that the Executive had exceeded his powers. The court thought so too. On review the Supreme Court told the President that he had no basis in law or the Constitution for his action, and told him to go to Congress for authority.[3] Two of Presi-

[2]These and other cases involving the notion of "mandate" are discussed in S. G. BROWN, THE AMERICAN PRESIDENCY (1966).

[3]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The case is popularly known as the *Steel Seizure* case.

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dent Truman's appointees to the court voted with the 6-3 majority. Truman promptly gave the mills back to their owners, thus accepting limitation upon presidential power in a matter of national security even in time of war.

In another test of where the line might be drawn, the Supreme Court, with no dissents, ruled in 1972 that the President's constitutional power "to take such measures as he deems necessary to protect the United States against the overthrow of the government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the government" did not mean that he could violate the Fourth Amendment by conducting electronic surveillance without a search warrant.[4] The issue, said Justice Powell, requires "sensitivity both to the government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion. . . ."[5]

Two years later, July 24, 1974, the Supreme Court by unanimous decision upheld a lower court order to President Nixon to turn over subpoenaed tapes to the Special Prosecutor. The only exception was that passages deemed by the judge to be clearly critical to national security might be withheld. This decision seemed to say that executive privilege may not be invoked to cover evidence needed in a criminal trial or, probably, an impeachment proceeding. While it precipitated the President's resignation, it still left the matter of defining "national security" in the hands of the executive.[6]

But judicial review and congressional sanction are weak and intermittent weapons against executive discretion. While the justices were deciding two cases, the executive was making law through a hundred actions encouraged or acquiesced in by (or unknown to) Congress and unreviewed by the Court.

- It organized a secret tribal army in Laos, reached into Guatemala and Iran to change their governments, and attempted to do the same in Chile and Cuba—frustrated in the last case not by the other two branches of the U.S. Government but by Cuban executive action.
- The doctrine of counterinsurgency built up the U.S. military presence in Southeast Asia. When the President thought the covert action had to become much bigger and therefore overt, the

[4]United States v. United States Dist. Court, 407 U.S. 297 (1972).
[5]*Id.* at 299.
[6]U.S. v. Nixon, 418 U.S. 683 (1974).

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Senate gave him a blank check. The Supreme Court was silent, and not for lack of cases in which it could have accepted jurisdiction.

- The volume of the government's classified business grew at exponential rates. Court and Congress did not effectively complain. When an aspect of the secrecy issue finally reached the judiciary (the Pentagon Papers), the case was dismissed—partly because the government had fouled up the prosecution.
- White House fears produced an array of actions against Americans— warrantless wiretaps, electronic interception of telephone conversations, abuse of the Internal Revenue Service, attempted subordination of the CIA and the FBI in obstruction of justice—justified by the claim that national security was somehow at stake.

In the revealing light of the Vietnam conflict we can see that the overreaching of the "national security" claim inhered as much in our ends as in our means. If the U.S. is very ambitious in its aims abroad, its Executive is likely to be drawn into very ambitious tactics to attain them. And the overseas ambitions will then seem to justify uninhibited tactics—dirty tricks, official lying, secret surveillance—in dealing with Americans who seem to make more difficult the prosecution of America's uninhibited aims abroad.

The Constitution makes clear that treaties with foreign nations have the force of domestic law. What we have seen in recent years is the corruptive extension of this doctrine, by which the Executive (without the formality of the Senate's advice and consent) acts at home beyond the pale of domestic law on the basis not of an explicit foreign agreement but a vague and unreviewed threat to the national security.[7]

THE DEVELOPMENT OF NATIONAL SECURITY

The "obsession with security matters" which Secretary of State William Rogers complained about in 1973 can be traced to that moment when Marshal Stalin, in 1946, told the Supreme Soviet that the world's Communists—he still presumed to speak for the Chinese —could not collaborate in peacetime with the capitalist governments of the West, that the business of the Communists was to build socialism, not mere accommodation and reform.

[7]A full discussion of the informal, or *de facto*, increase in the President's foreign affairs powers in recent decades is found in L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 37–123 (1972).

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To coordinate this postwar militancy, the Cominform was established. Agreements to hold free elections were torn up and Soviet rule was consolidated over Eastern Europe. In the U.S. Earl Browder, a Communist who favored accomodation and reform, was dumped by the indirect but effective Stalinist tactic of criticizing him in the French Communist press. The first Berlin crisis, and the airlift it provoked, began a war called Cold that periodically threatened to heat up East-West relations. The Russians rejected the U.S. offer to internationalize nuclear know-how and stock piles, and scientists in the United States, Canada and Britain defected to the Soviet Union with nuclear secrets. Mao Tse-tung was leading his kind of Communists in China to decisive victory over "our" Nationalists, close and traditional friends, who had incidentally sustained the most effective propaganda campaign ever conducted by a foreign country in the United States. And eventually Nikita Khrushchev, visiting America, threatened to "bury" the Americans.

The early response, in President Truman's time, was typically American—to establish a special organization to deal with the newly perceived threat. The National Security Act of 1947[8] created the National Security Council. That was not significant in itself; over the years the National Security Council has not often been called together to deal with a crisis at White House level. But it was significant that national security was conceptually separated from foreign policy—which made "national security" available as a justification for government actions at home as well as overseas.

The 1947 Act reincarnated the wartime secret intelligence operation (O.S.S.) as the Central Intelligence Agency, placed it under the National Security Council, chartered it to gather facts anywhere abroad if U.S. security would be served thereby, and, if the President gave the word, authorized a variety of clandestine activities in the name of security.

Secrecy, the handmaiden of intelligence, became a fetish. Agencies were multiplied in bureaucratic competition. To the older intelligence agencies in the army and the navy were added a new Defense Intelligence Agency and a stronger domestic security function in the FBI. Finally, Congress authorized the National Security Agency to specialize in communications intelligence, including widespread electronic eavesdropping, in a law unique in American history—the law does not specify what the agency is for.[9]

[8] 61 Stat. 495 (1947).
[9] *Id.*

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THE "NEED TO KNOW" DOCTRINE

The structure of official secrecy rests on both law and practice. Security classification of papers and of personal knowledge is covered by the President's war powers and blessed by the National Security Act and the Atomic Energy Act of 1954. The Freedom of Information Act exempts matters specifically authorized under criteria established by Executive Order to be kept secret in the interest of national security or foreign policy and which are in fact properly classified pursuant to the order.[10] But the philosophy of secrecy seems to be based on two dubious propositions: (a) the fewer the people who know, the greater the security; and (b) only those should know who "need to know." The crucial determinations—who is in the know and who is out—are made by the first possessor of the secret, on his unreviewed judgment about the requirements of national security.

One consequence is to deprive the national legislature of its policy function on whatever the President and his advisers decide to handle alone. Congress is said to be much too large a body to be trusted to keep secrets—though the White House staff is larger. To maintain a show of cooperation the Executive keeps a few members of Congress informed, especially those who control the funding of the intelligence agencies. If most members of Congress do not know the facts, it follows that they cannot be meaningfully consulted on policies derived from analysis of the facts. That makes the Executive less accountable on precisely those issues most likely to be matters of life and death for Americans at large. "Separation of powers" in national security matters means separating Congress from the power to make policy.

Within the Executive Branch, secrecy also redistributes the power to affect policy. The "intelligence community" produces facts which are so closely held that they can be interpreted—and consequent policy recommendations made—only by those who know the facts. Since the intelligence people are among those in the know, they come

[10] 5 U.S.C.A. § 552(b)(1) (1976 Supp.). But Congress *could* review and override the President's power to classify to some extent. Justice White, writing for the majority in EPA v. Mink, 410 U.S. 73, 83 (1973), said, "Congress could certainly have provided that the Executive Branch adopt new procedures [for classifying documents] or it could have established its own procedures . . ." Legislation was introduced in Congress during 1973 to establish a statutory, rather than Executive Order, basis for security classification and to sharply limit the volume of papers classified, the duration of their classification, and the agencies and officials authorized to classify them. "Whatever secrecy is to be permitted concerning government records," former Chief Justice Earl Warren said in a 1973 speech, ". . . should be fixed by law."

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to have a disproportionate influence on policy as compared with "policy-makers."

The doctrine of "the fewer who know the greater the security" is seductive. On its face it makes sense, but decision-making about complex national security matters produces grotesque results so often that there must be something wrong with the picture. Some examples from recent history show how badly the principle works in practice:

- The Bay of Pigs fiasco resulted directly from insufficient candor in too small a group—some members of which, according to a former member of the Joint Chiefs of Staff, thought that in the presence of the new young political hero they "should speak only when spoken to." . . . At the U.N. General Assembly, Ambassador Adlai Stevenson was defending the U.S. non-involvement in the "refugee" raids on Cuba. He asked Washington for the true story, and the CIA provided the State Department with a false "cover story" which Stevenson used his global credibility to trumpet as the truth. The cover blew off in less than 24 hours.
- During the first few days of the Cuban Missile Crisis, only a few people were let in on the secret. During this period proposals to overreact by "surgical" air strikes were taken seriously in the small in-group. It was no accident that a more moderate (and certainly more effective) policy prevailed after a second tier of staff people had been brought in to sift the options and illuminate the risks, costs, and benefits.
- In the period after 1965 the circle of trusted Presidential advisors running the war in Vietnam was progressively narrowed, and the war policy got progressively more out of touch with public and Congressional opinion, or even with staff-level reactions in the Executive Branch.[11] Only when President Johnson, in early 1968, rather suddenly widened the circle of consultation, even seeking the views of known opponents, did he sharply alter course.[12]

11". . . I cannot, in retrospect, square the Viet Nam War with my concept of democratic government. What President Johnson did not do, when he had made up his mind in 1965, was to lay out fairly and frankly for Congress and the American people the choices facing us, the risks we were taking, and the possible consequences of our intervention. His failure to do so led in the end directly to attacks upon his credibility and to a serious erosion of the trust and confidence of the public in the President." Katzenbach, *Foreign Policy, Public Opinion and Secrecy*, FOREIGN AFFAIRS, Oct. 1973, at 11.

12The story of one straw in that new wind is told in H. CLEVELAND, THE FUTURE EXECUTIVE 19–21 (1972).

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- A matter so vital to the conduct of foreign policy as the decision to deploy anti-ballistic missiles was decided without consultation with NATO allies or even the U.S. Department of State; together they learned about a new American policy from news dispatches of a speech by a Secretary of Defense in San Francisco.
- In the Nixon years, the damage caused by failures of presidential consultation—on Cambodia (3,630 secret air raids between March 1969 and May 1970, on the tactics of rapprochement with Peking, and on the world-wide military alert in 1973—is still fresh in the memory of Americans, and of Japanese and European allies as well.
- The delegation head responsible for negotiating strategic arms limitations with the Soviet Union apparently did not "need to know" that the White House had already agreed to a fallback position. He continued to bargain hopelessly for what had already been surrendered, while his opposite number on the Russian side of the table already knew that a deal had been made at higher levels.[13]

THE TROUBLE WITH SECRECY

The notion that secrets should be limited to those with a "need to know" has at least three defects. One is that those who already know make the need-to-know determination. They can scarcely be expected to welcome to the charmed circle potential heretics within the Executive Branch, or potential critics and opponents in Congress and the country.

A second defect is that the "need to know" doctrine is extremely corruptible. Once the system permits the President and his agents to decide who should know what about executive intelligence and operations, it is overwhelmingly likely that government officials will use the system to hide their mistakes and their debatable judgments from colleagues, subordinates, inspectors, controllers, Congressmen, courts, and constituents by deciding that none of those have a "need to know." The *opera bouffe* of the White House tapes bears witness.

A third defect of the "need to know" doctrine is even more basic: it inhibits asking the underlying question whether secrecy in a particular case serves the national interest anyway.

Being let in on a secret is a status symbol—in small-town gossip, in international diplomacy, or in Washington politics. If you are favored

[13] *See* J. NEWHOUSE, COLD DAWN: THE STORY OF SALT (1973).

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with a confidence, you are likely to be among the last to question whether the confidence really needs to be confidential, since your "inness" depends on its confidentiality. Those to whom the secret is *not* whispered are much more likely to call for openness, candor and participatory process.

Yet in our most famous cases of crisis management, even some of the crisis managers now question procedures that automatically equated national security with the need for secrecy. "Unhappily," says Nicholas Katzenbach, "secrecy in foreign affairs—and particularly in the atmosphere we have lived in for the past 25 years—is easily rationalized. Yet the reasons seldom have much to do with the rationalizations. In recent years, at least, the real motive has been precisely to avoid the difficulties inherent in our political system and hopefully to present the public with triumphant *faits accomplis*."[14]

In retrospect it appears that the insistence on secrecy in crisis management has often been the product of not only presumed military necessity but also of the desire of a president or his staff to avoid being scooped on an important policy announcement—a natural human motivation, but not to be confused with the nation's security. In three of the cases mentioned above—the discovery of Russian missiles in Cuba in 1962, the President's intent to visit Peking in 1971, and the U.S. effort to prevent a possible unilateral Soviet intervention in the Middle East in 1973—it is now doubtful that elaborate measures to maintain secrecy until the President was ready to go on television served any higher purpose than to enhance and personalize the drama of the President of the United States in action. They served that purpose very well indeed. But from whom were the secrets kept? The Russians knew the missiles were there. The Chinese knew that Nixon was coming to call. The Russians had been told that we did not favor their apparent intent to send armed forces to the Mideast. Those kept in the dark until a television drama could be arranged included, respectively, our Western Hemisphere allies in 1962, our Japanese and Korean allies in 1971, our NATO allies in 1973—and, in all three cases, the governed in America.

In the 1962 case, the drama was so great that it included almost immediate hemispheric and domestic support for the President's policy. Yet without secrecy that support might well have been available from the start. In 1971, the drama was very costly in U.S.-Japan relations. In 1973, the President's decision to call a global military

[14]Katzenbach, *supra* note 11.

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alert with no Atlantic consultation drove a wedge into NATO unity which was then further pierced by European unwillingness to coordinate with Washington on Arab oil policy. Were the histrionics of personal presidential diplomacy worth the transpacific and transatlantic heartburn they are still causing?

If the costs of secrecy in the name of national security can so readily outweigh the benefits even in crisis situations, it is even more important in the day-to-day politics of domestic and international policy-making to make sure, as Katzenbach suggests, that rationalizations of secrecy are not substituted for the reasons. One of the lessons from Watergate is that public officials are well advised to apply even to their secret actions the test of how they would look if scrutinized in public; so many secret actions do become widely known sooner or later anyway. The cautionary principle is: *if the validity of your action depends on its secrecy, watch out!* Perhaps this warning should also be inscribed on the wall of the White House Cabinet Room where the National Security Council meets in times of tranquility and *ad hoc* advisors to the President gather in times of crisis.

THE "NATIONAL SECURITY" CLAIM

Reasons of national security, determined behind a screen of secrecy, have long been used as justification for "dirty tricks" practiced on other nations, especially if they happened to be declared or undeclared adversaries at the time. "All's fair in love and war," as the saying goes. In the past generation, featuring regional wars and a global arms race, tactics considered acceptable or even heroic when used overseas against enemies have been adapted by federal agencies for use also against those seen as helping our enemies at home. Practices become familiar in World War II—the unannounced search, the preventive arrest, the warrantless wiretap—have continued; the wide-ranging system of official secrecy expanded far beyond wartime practice in the "post-war" period. And Presidents have taken to doing, with only whatever consultation they personally deemed necessary, what they personally thought needed to be done to protect a mestastisizing concept of the national security.

The interesting thing about the "national security" claim as a basis for extra-legal activity is that it seems very strong when adduced in private, and withers away when challenged in public. Just as President Truman backed away from his steel seizure when the court declared it unconstitutional, so President Nixon (according to his own

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testimony) accepted the Court's reversal[15] of what he had earlier called "a reasonable belief that in certain circumstances the Constitution permitted—and sometimes even required—such measures [wire-tapping without a search warrant in violation of the Fourth Amendment] to protect the national security in the public interest."[16]

No defendant in the criminal cases growing out of the 1972 election was able to bring himself or his attorneys to define persuasively a concept of national security that would have justified him in going beyond the Theodore Roosevelt principle to the committing of crimes against the laws and Constitution of the United States in the name of higher purpose as determined by an Executive sworn to uphold them.

Egil Krogh, Jr., who supervised the special White House leak-investigating unit called the Plumbers, had intended to assert in his defense that the break-in of Ellsberg's psychiatrist's office was designed to defend national security. But his conscience, he said, would not permit him to do that; he had come to feel the break-in was a violation of constitutional rights.

The President had already cut the ground from under such a defense. In his August 15, 1973 television talk, he had criticized "the assumption by those involved [in Watergate] that their cause placed them beyond the reach of those rules that apply to other persons and that hold a free society together. That attitude can never be tolerated in our country." He continued, ". . . if we lose our liberties we will have little use for security." The irony that Nixon's own behavior, as later revealed, belied his words does not detract from their good sense.

What has happened, during a generation of obsession, is that constitutional government has become presidential government through a process no one overtly intended.

The debility of Congress, which it shares with other collective bodies organized as legislatures (professional associations, democratic trade unions, academic faculties, stockholders' meetings, student governments), is less the result of plotting by the Executive than the consequence of the complexity of the problems Congress is supposed to solve. The degree to which Congress has become "the separate but unequal branch of the federal government" can even be quantified: up to 1971 Congress had acquired only four computers, and used

[15]United States v. United States Dist. Court, 407 U.S. 297 (1972).

[16]President Nixon's television address to the nation on Watergate, August 15, 1973.

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them mostly for payrolls and housekeeping; the Executive Branch had four thousand computers (all authorized by Congress), working mostly on substantive policy.[17]

We have already suggested that the federal judiciary, with honorable but only occasional exceptions, has been hardly more successful than Congress in stemming the flow of power into the White House. Thus the arrogance and open contempt with which Nixon staff men treated Congress and the courts reflected all too accurately the true distribution of power among the three constitutional branches of government. The Presidential assistants' lack of politesse, heightening the drama of illegal actions they sponsored and tried to hide from public view, finally aroused the citizenry because it illustrated in easy-to-understand terms how "separation" no longer meant a balancing division of powers.

FENCING IN THE EXECUTIVE

A popular cliché has it that Watergate was a blessing in disguise. It was not a blessing of any kind, disguised or exposed. It was and remains a very large self-inflicted wound in that unique institution which is the Presidency of the United States. But it is a comprehensible injury, resulting quite directly from the corruption of Presidential power in the "national security" era.

The problem is not to limit the President's powers—they will, on the contrary, have to be expanded in future years to deal with such comprehensive challenges as the supply of energy, the control of pollution, and the building of peace in a technological world. The problem is to build a structure of accountability in which the President and his agents have every incentive to use his powers in ways that can be explained with a straight face outside the narrow circle of White House staff and Presidential appointees.

We can no longer comfort ourselves, as Louis Brownlow did, with the thought that no President of the United States "has been recreant to his high trust."[18] We must, on the contrary, assume that if the President has authority to violate laws and Constitution for reasons he must justify only to himself, the chances are that the laws and the Constitution will be violated.

There are, broadly, two antidotes to the excesses of the Executive and his agents. One is to fence them in with the constraints of con-

[17] J. Califano, Cited in H. CLEVELAND, *supra* note 12, at 42.
[18] L. BROWNLOW, THE PRESIDENT AND THE PRESIDENCY 51 (1962).

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sultation. The other is to hold their feet to the fire of "the general opinion of mankind."

The main benefit of consulting others about one's actions is not so much that they may be persuaded as that the quality of one's own decisions may be improved by knowing in advance who would think and do what, once the decision is taken.[19] In other words: it is not only the President who should decide what the national security requires. In a separation-of-powers government, no one branch can have a monopoly of so important a determination—and the more life-and-death the issue, the less appropriate is a one-branch monopoly of information and decisions about it. The Congress, despite the obstacles to concentrating its attention and mobilizing it for considered action, must play its part; and the "national security" justification for both executive and legislative action must be reviewable by the courts.

How can the President be induced to open up channels of consultation with agencies and branches of the Federal Government that have the *independence and competence and jurisdiction* to question him sharply whenever national security is used as a justification for action which would otherwise be unjustifiable?

The courts have the requisite independence. But they are inhibited by the antique notion that they should address themselves not to public policy issues (which have many sides) but only to two-sided arguments between defined adversaries in particular cases. The Congress has the jurisdiction, but often neither the competence nor the independence (remember the Gulf of Tonkin Resolution) to act as a valid respondent to a Presidential initiative. Professional agencies within the Executive Branch, such as the State and Defense Departments, the FBI and the CIA, and the Department of Justice, usually have the competence and the jurisdiction, but lack the independence to argue with a President who has made up his mind—or whose desires are regarded by his staff not as propositions to be argued among professionals sworn to promote the public interest but (in General Haig's later regretted phrase) as "orders from your Commander in Chief."[20]

The Federal Courts would be a more useful buffer against the abuse of the "national security" claim if they could render advisory opinions in important matters touching the constitutional powers of the President and the Congress. As a common law practice, state

[19]A general theory of consultation is suggested in H. CLEVELAND, NATO: THE TRANSATLANTIC BARGAIN 13–33 (1970).

[20]On this general subject *see* G. REEDY, THE TWILIGHT OF THE PRESIDENCY (1970).

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courts do sometimes give advisory opinions, but in *United States v. Hudson and Goodwin*[21] the Supreme Court ruled that the common law is "not a law of the United States." Further, an advisory function for the federal courts is said by some to be ruled out by implication in Article III of the Constitution which extends the federal jurisdiction only to certain types of cases and "controversies" specified as to parties at interest. But despite precedents and other obstacles, it seems wise for Congress to find means to extend the jurisdiction of the Federal Courts. In recent articles Professor Raoul Berger has effectively argued that legal obstacles to advisory opinions are no more than obstacles and can be overcome if there is the will to do so.[22]

It would certainly be useful for the Congress, by concurrent resolution not subject to Presidential veto, to be able to ask the Supreme Court directly whether the President in a particular situation (such as the hidden bombing of Cambodia or warrantless surveillance of journalists) is exceeding his constitutional authority. We would still be depending on presidents voluntarily to abide by such opinions, as they have abided so far by opinions in case law (the steel seizure ruling and the 1972 wiretap decision); but that is merely to say that we would still rely, as we have for two centuries, on our collective good sense not to elect presidents who would use the ultimate Executive power, military force, to rule by fiat.

How can the competence and independence of Congress be enhanced? As a large collective body, whose members must ultimately do as their several constituencies would like them to do, Congress is no match for a vigorous Executive backed by departmental bureaucracies in every specialized field. Indeed, though a hard-working veteran committee chairman can usually get his imprint on it too, much legislation is actually written in the Executive Branch.

Yet Congress has one executive-type servant who in recent years has demonstrated the competence and the independence to pit himself successfully against the executive agencies. He is the Comptroller General of the United States, appointed by the President (with Senate

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[21] 11 U.S. (7 Cranch) 32 (1812).

[22] "A happier approach is to submit a controversy between Congress and the President, arising out of conflicting claims to power, to the Court, as Andrew Johnson wished to do. That approach met with the approval of Chief Justice Chase. . . . Conflicting boundary claims are preeminently suited to judicial arbitrament, the least disruptive of solutions. Such arbitrament calls for a realization by both Congress and the President that neither can unilaterally decide the scope of the other's powers." R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 300–01 (1973).

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confirmation) for a fifteen-year term. He presides over a sizeable bureaucracy called the General Accounting Office, which used to consist mostly of accountants and auditors, but now includes many management experts and some lawyers as well.

The countervailing power of Congress would be enormously strengthened if the Office of the Comptroller General were granted the power to subpoena papers and witnesses relevant to its investigations, and empowered to go directly to the courts when dealing with executive agencies and individuals. Although the Comptroller General unearthed some of the early indications of illegal spending by the 1972 Committee to Re-elect the President, only the Department of Justice could take follow-up action to prosecute in the courts.

The anomaly of one Executive Department as the sole agency to prosecute another was unhappily emphasized in 1973 when one Attorney General was indicted for conspiracy, another resigned because his friends were principal actors in the Watergate scandals, while a third resigned, as did his deputy, in protest against presidential firing of a special prosecutor assigned to investigate and prosecute Executive wrong-doing, including allegations against the President himself. An earlier Attorney General had used his authority as a screen for corruption of various sorts highlighted by the Teapot Dome scandal of 1924. It seems reasonable to suggest that if the Department of Justice can bring Members of Congress into court the Comptroller General, acting on behalf of the Congress as a body, should have power to bring against executive agencies or individuals actions designed to keep them honest. To perform this function, the Comptroller General would have to add legal staff competence to his present arsenal of experts; the same legal counsel could handle the technical aspects of asking for advisory opinions once such action had been voted by both Houses of Congress.[23]

In "national security" matters the President's obligation to consult with Congress should probably be formalized. At present the initiative in such consultation, and the decision about which bits and pieces of classified information to select and reveal to Members of Congress, rest wholly with the Executive. Congressional leaders are usually brought in after the President has already decided what to do; sometimes the "consultation" occurs a few hours or even a few

[23]Senator Mondale's bill, introduced in 1973, to establish an Office of Congressional Counsel is another possible alternative. Senator Weicker's 1976 bill to create a permanent special prosecution office in the Justice Department has the defect that the office's independence of the Executive could not be guaranteed.

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minutes before the President goes on national television with a policy announcement. The problem is to get congressional leaders in on the act before the President makes up his mind.

One device would be to provide, by amendment to the National Security Act of 1947, that designated leaders of the two houses of Congress serve as members of the National Security Council. To prevent the Executive from bypassing the N.S.C. in order to bypass the Members of Congress, the amendment might also provide that on certain classes of decisions (such as the dispatch of U.S. troops to, or the bombing of, foreign lands) the President must convene and seek the advice of the N.S.C. members, though he could not, of course, be bound to accept it.

The War Powers Act of 1973, passed over President Nixon's veto, limits to some extent the executive power to use armed forces in combat for national security purposes. If troops are used without prior Congressional consent, the President must secure such consent within 60 days. If consent is not forthcoming the President must withdraw the troops within not more than 90 days and cease other actions at once. This provision will no doubt inhibit some presidential war-making, especially in slow-breaking crises. But the law does not require prior consultation, and Congress would find it difficult if not impossible to veto a war once our forces are engaged.

Some of the recent damage to executive-legislative relations will have to be repaired by better manners, not just better machinery. The extreme suspicion and arrogance of the Haldeman-Ehrlichman regime is mercifully past. Voluntary compliance by appointees and agents of the President with the elementary obligation to account to Congress for their policies can do much to restore public confidence. But voluntary compliance is obviously not enough.

Confusion about congressional consultation has been produced by the claim that "executive privilege" covers not only direct advice to the President but a vast array of actions by subordinates who considered themselves invisible and untouchable yet whose activities were not, according to the White House story, even known to the President. Thus, in considering fences to be built around executive excess (without reducing executive power to deal with the world as it is), we should not neglect the White House staff itself. When the Executive Office of the President was established in 1939, President Roosevelt asked only for six nearly anonymous assistants in the White House to help him do the work required by law. That such assistants should be accountable only to the President seemed reasonable enough. Three decades and three major wars later, there are not six

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but hundreds of White House staff people; in some of them immense power is vested, not by law but by the President or by inertia.

To re-establish the White House staff by statute as an accountable agency of the Federal Government will stretch the skill of the most astute political analysts and legislative draftsmen. But it seems essential, now that so much of the executive power is ultimately exercised not by the statutory departments but by *ad hoc* agencies and special-purpose Presidential counselors and assistants. At the least, the principal presidential assistants should be available to answer questions of appropriate congressional committees, that is, about public policy and about what they *do*, as distinct from what they *say* in conversation with the President. Congress might also require such assistants to justify their share of expenditures under White House budget headings. And it is surely not too much to suggest that all presidential assistants should be answerable to criminal charges of misfeasance, with no recourse to "superior orders" as a defense.[24]

Presidential accountability ought to begin before a candidate becomes President. Exercising the powers of the President is preceded by running for election. There is consequently a chance to distinguish between the powers a President inherits with the office, and those he has because he has a "mandate" from the electorate.

Both President Johnson and President Nixon were re-elected with massive majorities, and promptly interpreted them to justify Presidential actions which the candidate either had denied he would take (sending American combat troops to Vietnam) or had neglected to mention during the electoral campaign (dismantling the poverty agency and other social and educational programs). In Johnson's case the Congress bought the "national security" argument for a more active role in the Vietnam War, but the people's will to get out finally brought down his administration. Richard Nixon defied this same lesson from history when, in early 1973, he tried to dismantle long-standing domestic programs and agencies with no popular mandate and dubious legal authority to do so. Yet he dared not go to Congress to ask for enabling authority because the measures he wished to take ran contrary to the expressed will of the Congress—and the Democratic Congress had been re-elected by a majority similar to his own.[25] Before long the courts found Nixon's veto by impounding unconstitutional in several cases.

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[24]Senator Mondale's bill to require Senate confirmation of presidential assistants is a step, but only a step, toward enforceable accountability.

[25]S. BROWN, *supra* note 2, at 111–20; S. BROWN, THE PRESIDENCY ON TRIAL 108–12 (1972).

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The general lesson for the future seems to be that unless a presidential action has been quite explicitly "cleared" with the electorate in a winning campaign, it had better be the subject of careful explanation and visible "clearance" with the Congress (in the case of a policy change) or with the courts (in case executive power is to be used beyond the understood limits of the laws and the Constitution, as in "national security" surveillance).

PUBLIC FACE AND PRIVATE FACE

We have suggested a complex of institutional fences that might be built around the claim, by a President or his agents, that they are justified in overstepping the bounds of law and Constitution because the national security is at stake. The new fences would all be variations on a single theme: the President should be obligated to expose his national-security decisions *before* they are taken, to persons who are not obligated to say "Yes, sir."

1. The Supreme Court might interpret the law in timely fashion through advisory opinions.
2. The Comptroller-General, as an agent of Congress, might participate through subpoena-supported inquiry into, and prosecution in the courts of, executive excess.
3. Congressional leadership might participate more directly, and of right, in the Presidential decision-making process.
4. The claim of executive privilege, buttressed as it is by a widespread system of security classification, might be defined more specifically and interpreted more narrowly. *U.S. v. Nixon* was a useful signpost along this road.
5. The White House staff might be defined and established by statutes and its members made accountable "in another place" for their actions (as distinct from their advice to the President).
6. Presidents might learn from history the danger of assuming an electoral mandate for actions that were not explicitly "cleared" with the people during the campaign.

But the ultimate fences against the abuse of public power will always be in the reasoning conscience of the individuals involved. "[T]he answer," President Nixon said in his August 15, 1973 TV talk ". . . lies in a commitment by all of us to show a renewed respect for the mutual restraints that are the mark of a free and civilized society." "All of us" includes but is not limited to the President.

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The most powerful agencies of the law are not the institutions of its enforcement. These can threaten and cajole, and they can be so fashioned that representatives (including self-appointed representatives) of the affected publics can follow the play of public policy, recognize the players who presume to act in their interest, and blow the whistle when it appears that the public faces of their public executives cannot be reconciled with their private faces. But ultimately each public official, and each citizen, is responsible for his or her own behavior.

In a society so complex that no one can be in charge and therefore all of us (and especially public officials) are partly in charge, each responsible individual has to ask himself or herself, several times a day, "Does this action of mine really have to be taken behind a curtain?" and if it does, "Will I still feel all right about it if the curtain is snatched away?"

It is not a new formula for illuminating the ethics of public responsibility. John Dewey spoke of "the rehearsal of consequences," and one remembers the wise admonition of *The Federalist* (No. 63): ". . . how many errors and follies would [America] not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?" But there are new and useful tools for use in guessing, or "gaming," what the relevant parts of mankind might think and do about decisions not yet made.

The simulation of alternative futures is increasingly in vogue as a guide to avoiding the least desirable ultimate outcomes by taking the most sensible actions now. The fast computer is an enormous advance in helping us to think ahead; even more helpful is the fact that the human brain seems extraordinarily adept at framing workable policies, and changing them over time, when it is suitably informed of their probable consequences. Game theory and other forms of semi-computerized analysis, applied to human purposes and not just to physical means, are likely to be more and more helpful to public officials and their critics whose daily business is the rehearsal of the consequences of their own actions.

The people are corruptible by rhetoric, affectation and coverup—some of the people, some of the time, up to a point. But in the long run, most of the time, the people will see through the public face to the private face. At least, a conviction to that effect seems essential to making constitutional democracy work.

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